FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1862

In The
Supreme Court of the United States
October Term, 1984

JOHN TERRY MORELAND,
Petitioner,

v.

CARL W. POSS, SR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY O. BRAMLETT
(Counsel of Record)
JEFFREY M. SMITH
THOMAS B. METZLOFF
BONDURANT, STEPHENSON
& SMITH
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383-4501
(404) 581-5200

Counsel for Respondent
Carl W. Poss, Sr.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

Should the Supreme Court exercise its discretionary power to review a non-final state court decision properly applying *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982) to dismiss a Section 1983 claim against a private party where the petitioner does not challenge the constitutionality of any state statute, regulation, or rule of conduct?

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Respondent Carl W. Poss, Sr. respectfully opposes the Petition for Writ of Certiorari to the Supreme Court of Georgia, and hereby shows that this Petition should not be granted by this Court because it does not implicate any concerns under Rule 17 and because it is jurisdictionally defective under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The Petition seeks to review an interlocutory decision by the Georgia Supreme Court affirming-in-part and reversing-in-part a partial summary judgment granted in favor of Respondent. The factual record in this case is in dispute. While some discovery has occurred, several important factual issues remain to be resolved after trial.[1] Given the procedural posture of the case, the courts below accepted as true Petitioner's self-serving allegations.

While much of the Petitioner's statement of the case is overstated rhetoric, the factually disputed matters are not significant to the narrow issue presented in the Petition. Since this Court will not resolve the factual disputes raised in this case which will be subsequently determined at trial, Respondent will not burden this Court with an extensive recitation of additional factual items, and will instead generally accede to the Petition's allegations.

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[1]Some of the factual issues that remain include who was responsible for arresting Petitioner, whether Respondent directly or indirectly caused DeKalb or Rockdale law enforcement officials to arrest Petitioner, and the specific content of any communications that allegedly took place between Respondent and the DeKalb County Sheriff's Department employees during the period in question.

Petitioner filed suit against Respondent, who is an attorney engaged in the private practice of law, and eight other defendants[2] in the Superior Court of Fulton County in the State of Georgia. The once amended Complaint alleges seven counts against all defendants based upon the following causes of action: (1) Section 1983; (2) malicious arrest; (3) false imprisonment; (4) invasion of privacy; (5) conversion; (6) assault and battery; and (7) trespass. None of the counts differentiate among the defendants. All counts reference the entire set of factual allegations set forth in the amended complaint.

The Complaint generally alleges that the order filed by Respondent was "unlawful, invalid and improper on its face; yet it was carelessly, negligent, and recklessly processed by members of the DeKalb County Sheriff's Department, who could have and should have questioned it." *Complaint*, ¶ 7. The Complaint does not challenge the

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[2]In addition to Respondent, the original defendants were (1) Pat Jarvis, Sheriff of DeKalb County; (2) Olivia Davis, Supervisor of the Warrant Division of DeKalb County Sheriff's Department; (3) Virginia Woodall, Deputy Sheriff of DeKalb County; (4) Victor B. Davis, Sheriff of Rockdale County; (5) Mark Weaver, Deputy Sheriff of Rockdale County; (6) Tony Godfrey, Deputy Sheriff of Rockdale County; and (7) Unknown members of the DeKalb County Sheriff's Department. Each of the individual defendants other than Respondent were sued both individually and in their official capacities. Plaintiff subsequently moved to dismiss his claims against Tony Godfrey, and add as defendants Rebecca S. Henderson and Garland P. Copeland, both of whom were employed in the DeKalb County Sheriff's Department. This motion was granted, and an amended complaint reflecting this change was filed.

Various defendants have filed cross-claims against other groups of defendants including cross-claims by all defendants against Respondent. Respondent subsequently cross-claimed against the other defendants.

validity of any specific state statute, regulation, or procedure. Furthermore, the Complaint does *not* allege a conspiracy between Respondent and any state official to deprive petitioner of his constitutional rights. Rather, as noted from the section of the Complaint quoted above, the complaint is primarily based upon a claim that the state officials were negligent in this specific case, and that Respondent was a catalyst.

Respondent filed a motion for summary judgment, which was granted as to all counts against him. The trial court's decision did not limit the claims pending against the other defendants. The Georgia Court of Appeals reversed the dismissal of two of the counts finding that Petitioner had a valid cause of action against Respondent based upon: (1) the federal Section 1983 claim; and (2) a state claim for false imprisonment. The Georgia Court of Appeals affirmed the dismissal of the remaining counts against Respondent.

The Georgia Supreme Court subsequently reversed the Georgia Court of Appeals on the Section 1983 federal claim, but affirmed on the state law false imprisonment claim.

SUMMARY OF ARGUMENT

The Petition is based upon two arguments both of which are incorrect. First, Petitioner claims that the Georgia Supreme Court erred in even considering *Lugar v. Edmondson Oil Co.* Second, even assuming that *Lugar* is relevant, Petitioner suggests that the Georgia Supreme

Court erred in applying *Lugar* to the specific allegations of this case.

The Georgia Supreme Court properly relied upon this Court's analysis of Section 1983 contained in *Lugar*. In addition, the Georgia Supreme Court's application of *Lugar* to this highly fact specific case was correct. Petitioner attempts to distinguish *Lugar* by focusing on the Respondent's allegedly improper *private* activities. This purported distinction demonstrates the correctness of the result below. As made clear in *Lugar*, a Section 1983 plaintiff asserting claims against a private individual must challenge the constitutionality of some state statute, rule, or course of conduct in order to meet the "under color of state law" requirement. Private misuse of some state procedure is insufficient.

In addition, the Georgia Supreme Court's decision is not final. Trial on the merits against the remaining defendants and against Respondent on a related state law claim remains. Accordingly, the Petition is jurisdictionally defective.

1. The Georgia Supreme Court's reliance on and application of Lugar v. Edmondson was correct, and does not conflict with any other federal Court of Appeals or other state court of last resort.

Petitioner primarily argues that the Georgia Supreme Court's analysis of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) was improper because (1) *Lugar* should be limited to its facts involving a Section 1983 challenge to a state's pre-judgment attachment provision; and (2) even if *Lugar* were relevant, the Georgia Supreme Court's analysis misapplied the test established therein.

The first argument is frivolous. Relying on a footnote in *Lugar* that its *holding* was limited to the pre-judgment attachment context and certain statements in Justice Powell's dissenting opinion, Petitioner suggests that Lugar's *analysis* cannot be applied outside of its specific factual context. This "head-in-the-sand" approch is both novel and without support. Other courts are certainly entitled to rely on *Lugar* when analyzing whether a private party is properly chargeable under Section 1983 with acting "under color of state law." Numerous courts have relied on *Lugar* as controlling authority for determining the color of state law issue. *See, e.g., Dahlberg v. Becker,* 748 F.2d 85 (2d Cir. 1984) (applying *Lugar* to a Section 1983 claim by a husband against his former wife's attorney), *cert. denied,* — U.S. —, 105 S.Ct. 1845 (Case No. 84-1246, March 25, 1985); *Krynicky v. University of Pittsburgh,* 742 F.2d 94 (3d Cir. 1984) (applying *Lugar* to a Section 1983 claim by dismissed employee against university), *cert. denied,* — U.S. —, 105 S.Ct. 2018 (1985); *Cruz v. Donnelly,* 727 F.2d 79 (3d Cir. 1984) (applying *Lugar* to a Section 1983 claim by customer against store owners).

Petitioner attempts to distinguish *Lugar* by noting that the claim involved a constitutional challenge to a state procedure with substantial governmental involvement, an allegation not present here. *Petition,* pp. 13-14. In *Lugar,* the Court concluded that the petitioner could only assert one of his claims under Section 1983 because that claim sufficiently alleged that the state statute under which the private party acted was constitutionally defective. *Lugar,* at pp. 940-941.

In attempting to avoid *Lugar,* Petitioner has demonstrated why the Georgia Supreme Court's result was cor-

rect. As explained in *Lugar*, Section 1983 is simply not available against private parties absent some meaningful connection to or challenge of a state law. Thus, "private misuse of a state statute does not describe conduct that can be attributed to the State . . . ." *Lugar*, at p. 941, *See, e.g., Dahlberg, supra*, 748 F.2d at 90; *Duncan v. Peck*, 752 F.2d 1135, 1141 (6th Cir. 1985); *Turner v. Kaiser Aluminum & Chemical Co.*, 602 F.Supp. 519, 523-24 (M.D. La. 1984). *Cf. Loyd v. Loyd*, 731 F.2d 393, 398-99 (7th Cir. 1984) (under *Lugar*, the "distinction between an attack on the constitutionality of a statute and an attack on a person's alleged misuse of that statute is crucial").

In *Lugar*, the Court affirmed the dismissal of one count of the petitioner's complaint against Edmondson Oil Company based upon the respondent's "unlawful acts." By alleging that a private party committed unlawful acts, that claim was fundamentally inconsistent with Section 1983's purpose of insuring that state law or state officials not work a serious deprivation of constitutional rights for which the State is properly chargeable. If an act committed by a private party is clearly unlawful under state law, the complaint cannot properly allege that the acts were sufficiently related to "any governmental decision." *Lugar*, at p. 940. Instead, the claim would be that the private party defendants "were acting contrary to the relevant policy articulated by the State." *Id.* While the unlawful acts may give rise to state law claims, they do not provide a basis for a federal claim under Section 1983. *See Dahlberg*, 748 F.2d at 93.

The allegations raised by the petitioner on this interlocutory appeal fall squarely into *Lugar's* description of purely private conduct not actionable under Section 1983. It is acknowledged that Georgia law does not condone or

support the actions allegedly undertaken by the Respondent. Petitioner does not challenge the constitutionality of any Georgia statute, rule, or standard of conduct, nor does he allege any conspiracy or on-going relationship constituting some sort of pattern or practice between state officials and respondents.[3]

The result below is consistent with other federal courts of appeals that have considered similar issues. Most notably, the decision is consistent with *Dahlberg v. Becker, supra.*[4] In *Dahlberg,* the Plaintiff brought suit against his former wife and her attorneys based upon the filing of an order to show cause why he should not be held in contempt for failing to make payments pursuant to a divorce settle-

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[3]If a conspiracy existed between private parties and state officials to deprive a plaintiff his constitutional rights, a Section 1983 claim would be proper. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970). *Cf. Dennis v. Sparks,* 449 U.S. 24 (1980). Chief Justice Hill expressly noted that no conspiracy was alleged here. *See Petition,* at p. 25a. Second, if there were an ongoing relationship showing some type of pattern such as where a store arguably has an arrangement with local police officers for handling shop-lifting cases in a manner that deprives citizens' constitutional rights, Section 1983 may be properly invoked. *See, e.g., Robb v. City of Philadelphia,* 733 F.2d 286, 292 (3d Cir. 1984). *Cf. Cruz v. Donnelly,* 727 F.2d 79 (3d Cir. 1984). No such allegations can be made here; rather, Petitioner repeatedly argues the significance of the unusual and indeed unique nature of the alleged events.

[4]Petitioner cites *Dahlberg* apparently for the proposition that it seems to set forth a somewhat different test in that it suggests three subparts rather than two with respect to the first prong of the *Lugar* test. *Petition,* p. 22. It is unclear whether Petitioner asserts that this alleged semantical difference is either significant or constitutes a conflict. Certainly the result in *Dahlberg* is totally consistent with the Georgia Supreme Court's resolution of this case.

ment agreement. As a result of the filing of the order, the plaintiff was subsequently arrested and held overnight.

The Court determined on a motion to dismiss that the allegations were insufficient to state a cause of action under Section 1983. "A private party's misuse of New York's Judiciary Law that causes plaintiff to be imprisoned overnight is not fairly attributable to New York State." 748 F.2d at 90. As with the Petitioner in this case, the plaintiff did not allege that New York's procedures for noticing or adjudicating contempt were constitutionally defective. The allegation in *Dahlberg* claimed only that the private party defendants had run afoul of the statutory framework. *See Diulus v. Churchill Valley Country Club*, 601 F.Supp. 677 (W.D. Pa. 1985) (dismissing Section 1983 claims against attorney who allegedly misused judicial proceedings).

The Georgia Supreme Court properly applied *Lugar* to dismiss the federal Section 1983 claim against Respondent. Since there is no conflict on the fact-specific issue raised in this case, this Court should deny the petition on the merits.[5]

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[5]None of the cases cited by Petitioner are to the contrary, and thus no conflict exists. In his argument, Petitioner primarily criticizes the Georgia Supreme Court for deciding the case under the first prong of the "fair attribution" test enunciated in *Lugar* rather than the second prong. While the cited cases do resolve the semantical question differently, there is no conflict with respect to the application of Section 1983 to attorneys on the facts cited. *Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984), clearly supports the decision below in that it held that an isolated incident, such as the one involved in this case, did not support a Section 1983 claim. The remaining cases cited by

(Continued on next page)

2. The decision below is not final.

The Supreme Court may only review "*final* judgments or decrees rendered by the highest court of a state . . . ." 28 U.S.C. § 1257 (emphasis added). In order to be reviewable, the state court judgment must be final as to all parties and issues. *See* Stern & Gressman, *Supreme Court Practice* 177 (5th ed. 1978). The considerations informing the finality doctrine are many and include maintaining harmonious relationships between federal and state courts by minimizing federal intrusion into state affairs. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973).

The decision below is clearly not final. The Georgia Supreme Court's decision only considered one claim against one defendant in a multi-count, multi-party suit. As set forth in the Statement of the Case, Respondent is one of nine defendants. All causes of actions and claims against

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Petitioner involved far more substantial governmental involvement in entirely different factual contexts. *See Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) (extensive and cooperative police involvement with landlord evicting tenant); *Morrison v. Washington County*, 700 F.2d 678 (11th Cir. 1983) (doctor in *public* hospital who had police remove and arrest patient), *cert. denied*, 464 U.S. 864 (1983).

The semantical distinction asserted by Petitioner has already been presented to the Court and rejected. The Second Circuit in *Dahlberg*, like the Georgia Supreme Court in the present case, held that an attorney's alleged misuse of state court procedures resulting in the arrest of a divorced husband did not constitute fair attribution under the first prong of *Lugar*. *Dahlberg, supra*, 748 F.2d at 90. The Court denied cert in *Dahlberg* on March 25, 1985, (Case No. 84-1246), thus rejecting the significance of any wording differences between *Dahlberg* and *Howerton* based upon which portion of the test is used.

the remaining defendants, *which include federal claims under Section 1983,* remain pending.

More importantly, even Petitioner's case against Respondent has not been finally adjudicated. Rather, while the trial court's dismissal of the federal claim was affirmed, a state law claim for false imprisonment *involving the identical factual allegations against Respondent* remains to be tried. *See Georgia Supreme Court Order* (remanding the case "for further consideration of the issues now pending in the trial court and for the claim of false imprisonment against Poss") (*Petition,* at p. 24a).

None of the applicable exceptions set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), are applicable. In *Cox,* the Court identified four exceptions to the finality doctrine permitting immediate review of nonfinal state court decisions. A brief description together with an explanation as to why the particular exception is not present in this case follows:

1. Immediate review is possible where the result on remand is pre-ordained. *Cox,* 420 U.S. at 479. Here, the result of the trial against the other defendants and the Respondent is not pre-ordained. Rather, as noted by the Georgia Supreme Court, several factual issues are disputed among the parties. Accordingly, the result of the trial is unknown. The trial probably will clarify many of the factual allegations which bear directly upon the federal claim raised in the Petition. For example, the trial may determine facts relevant to the Section 1983 federal claims against the other defendants which could conceivably moot the Section 1983 claim against Respondent. *Cf. Cox,* 420 U.S. at 477-78. It is premature to determine the

federal issues on the incomplete factual record now before the Court.[6]

2. Immediate review is also possible where the federal claims would survive *regardless* of the outcome on remand. *Cox*, 420 U.S. at 480. The present federal claim is not destined to survive the outcome of the remand. The trial will raise the same factual claims which Petitioner alleges support not only the Section 1983 federal claim against Respondent, but all other remaining claims.

3. A third exception exists for cases in which subsequent federal review would be barred by state law. *Cox*, 420 U.S. at 481. This exception is not applicable here. Following trial, all parties will maintain their full rights of appeal under state law.

4. Lastly, the Court has recognized an exception whereby a definitive ruling on the federal issue would preclude any further litigation, as opposed to a situation where immediate review would merely control the "nature and character of, or determine the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 483. This exception is not present. A final determination by this Court of the federal issue decided in the Geor-

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[6]In the context of a Section 1983 case, the existence of disputed factual issues argues strongly against appellate review. *See International Society for Krishna Consciousness v. Air Canada*, 727 F.2d 253, 255 (2nd Cir. 1984) (dismissing an interlocutory appeal as improvidently granted finding that the issues would be more sharply focused if it were a final judgment). Respondent believes that the record is sufficient to determine his non-liability under Section 1983. However, even assuming that the Georgia Supreme Court's position is arguably incorrect, it will be far more efficient to make that determination on the basis of a complete factual record.

gia Supreme Court would not preclude trial on the remaining state law and federal law issues against the other defendants or the state law claim against Respondent.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

JEFFREY O. BRAMLETT
(Counsel of Record)
JEFFREY M. SMITH
THOMAS B. METZLOFF

BONDURANT, STEPHENSON
& SMITH
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383-4501
(404) 581-5200

Counsel for Respondent
Carl W. Poss, Sr.